APPEAL NO. 93385

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was convened in (city), Texas, on March 29, 1993, and closed on April 1, 1993. The single issue before hearing officer (hearing officer) was whether the respondent, hereinafter claimant, timely disputed the certification of maximum medical improvement (MMI) and impairment rating given by (Dr. A) M.D. The appellant, hereinafter carrier, raises the following points on appeal: that the hearing officer erred in finding that the claimant timely disputed his treating doctor's certification of MMI and impairment rating; that he erred in finding that a dispute of impairment rating is also a dispute of MMI, when the latter is not mentioned by the disputing party; and that the hearing officer's decision regarding timely dispute was arbitrary and capricious, as the record suggests application of a different standard to a claimant as distinguished from a carrier. The claimant responds that the hearing officer's determination is supported by the evidence and should be affirmed.

DECISION

We reverse the decision and order of the hearing officer and render a decision that the claimant did not timely dispute the certification of MMI or the first impairment rating.

The claimant was employed by 9employer), a self-insured governmental entity whose workers' compensation insurance coverage was through the (carrier). It was not in dispute that the claimant suffered a compensable injury on or about date of injury).

As the hearing officer noted in his decision, very little about this matter is in dispute. Basically, the claimant had been treating with Dr. A for a back injury. Following carrier's request for a medical examination order (MEO), the Texas Workers' Compensation Commission (Commission) on October 24, 1991, determined that Dr. A should examine claimant pursuant to MEO order. Sometime thereafter, Dr. A completed a Report of Medical Examination (Form TWCC-69) certifying claimant had reached MMI on April 20, 1992, with a five percent whole body impairment rating.

At the hearing both parties stipulated that they first received copies of Dr. A's report on May 27, 1992.[1] On that date, carrier's claims examiner (Ms. SM) wrote claimant, attaching Dr. A's TWCC-69 and carrier's Form TWCC-21 (Payment of Compensation or Notice of Refused/Disputed Claim). After calculating claimant's impairment income benefits based upon Dr. A's impairment rating, Ms. SM's letter stated as follows: "The

[1]Although the Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provides that an employee's first impairment rating must be disputed within 90 days after the rating was assigned, this panel has previously held that the 90-day time period does not necessarily run from the date the rating is actually assigned. *See*, e.g., Texas Workers' Compensation Commission Appeal No. 93089, decided March 18, 1993. Ninety days from May 27th would be August 25, 1992.

enclosed check is for May 29, 1992 through June 4, 1992. You will continue to receive a weekly check for the next 15 weeks. If you do not agree with the disability rating given by [Dr. A], the physician of your choice, you have 90 days to dispute the rating."

On June 22, 1992, the assistant to (Mr. D), whom claimant had retained as his legal counsel as of June 15th, wrote to carrier advising it that Mr. D's firm had been retained to represent claimant and requesting copies of all medical records. By letter of June 30th, Ms. SM acknowledged receipt of the June 22nd letter and enclosed a copy of carrier's file.

On July 23rd, Mr. D's assistant wrote the following to the Commission, copy to carrier:

> The enclosed letter is a request for the above-captioned client [claimant] to see Dr. O, M.D., as his second choice of doctors. The reason for this visit is to obtain another evaluation regarding [claimant's] current back condition and impairment rating.

The parties stipulated at the hearing that this letter was received by the Commission on July 27th.

Ms. SM replied to this letter on July 28th. After noting that claimant had previously requested a third choice treating doctor, which request had been denied, she went on to state as follows:

> The claimant is receiving his Impairment Income Benefits per the 5% whole body impairment granted him on May 27, 1992, the date the TWCC-69 was received in our office. If the claimant wishes to dispute either the Maximum Medical Improvement or the Whole Body Impairment, then please contact me to discuss the possibility of a designated doctor.

On September 10th, Mr. D, on behalf of claimant, submitted a request for a benefit review conference. The disputed issue was described as, "[c]onfusion surrounding the number of treating physicians. Denial of third or subsequent doctor choice by carrier and TWCC. Claimant has one impairment rating designated by a doctor from TWCC (sic) will forego a chance for a designated doctor to settle a dispute between two physicians (Claimant's and Carriers' choice)."

A Commission disability determination officer (DDO) denied claimant's request by letter of September 30th. The DDO's letter said the change of doctor should be resubmitted on a Form TWCC-50 (Employee's Request for Third or Subsequent Treating Doctor). It also said the claimant's impairment rating "assigned on April 20, 1992 is final since it was not disputed within 90 days, per Rule 130.5(E) (sic)."

Mr. D replied to this letter on October 20th and asked for a benefit review conference "to consider our dispute of your legal conclusion" contained in the DDO's letter of September 30th. An October 14th TWCC-50 signed by claimant states in part that "[Dr. A] gave claimant an impairment rating. Claimant does not agree with [Dr. A's] opinion and does not wish to continue treatment."

A November 12th request for a benefit review conference signed by Mr. D gives the disputed issues as, "[c]laimant disputing impairment rating and maximum medical improvement given by [Dr. A]. Enclosed letter to TWCC dated July 23, 1992 Verifies (sic) this dispute and states claimants (sic) request for another impairment rating. . . ." When the November 12th request was transmitted to carrier, Ms. SM wrote the Commission stating that Mr. D's firm had, on July 23rd, forwarded a similar request for a third or subsequent treating doctor, and that she had advised claimant's counsel to contact carrier regarding any dispute over MMI or impairment rating. Ms. SM also said, "[t]he only correspondence in my file from the attorney on any of these matters, prior to this most recent request, was a letter addressed to your office for a Benefit Review Conference. That request was denied. According to my file, the 90 day period in which to dispute MMI or WBI [whole body impairment] has expired as of September 1992."

At the hearing claimant's counsel, Mr. D, argued that there is no particular form of notice required by the appropriate rule, Rule 130.5(e), which provides that the first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. He further argued that while the July 23rd letter did not use the precise words "dispute" or "maximum medical improvement," the intent was clear from the language requesting approval for the claimant "to obtain another evaluation regarding [his] current back condition and impairment rating." The hearing officer agreed, finding that the July 23rd letter constituted a dispute of the assigned date of MMI and impairment rating, as well as notice that the claimant was disputing the impairment rating and MMI, and that such dispute was raised in a timely manner.

In its appeal the carrier contends that the July 23rd letter is a request to change treating doctors, with the second sentence (concerning the claimant's back condition and impairment rating) explaining the basis for the request. The BRC request of September 10th, the carrier contends, is the first item that arguably may be considered as a notice raising a dispute over impairment, and apparently was viewed as such by the Commission DDO, who stated that the impairment rating had become final because not timely disputed. Language in the October 14th request to change treating doctors, and in the November 12th BRC request, clearly stated claimant's disagreement with Dr. A's opinion, the carrier says; however, it says, this notice was not timely.

The carrier also notes that Article 8308-4.25 and 4.26 state that if a dispute exists as to MMI or impairment, the Commission shall direct the employee to be examined by a

designated doctor. Thus, it argues, any notice of dispute should contain the following elements: it should identify the doctor by name; it should specify that the party disputes or disagrees with the findings of that doctor; it should specify whether the party disputes either MMI or impairment rating or both; it should be clearly communicated to the particular field office of the Commission which is handling the claim; and, it should be timely. The July 23rd letter, the carrier argues, was not sufficient to put the Commission on notice that claimant was disputing Dr. A's impairment rating or certification of MMI.

At the outset, we agree with the claimant that neither the 1989 Act nor Rule 130.5(e) sets forth a prescribed procedure or format by which a claimant must dispute MMI or an impairment rating. For that reason, as this panel has previously held, whether such dispute was timely made presents a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992. We previously have upheld the determination of the hearing officer on this issue where such determination was based on sufficient evidence of record. We have also held that there are no exceptions to the 90-day rule. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Furthermore, in the context of a similar time deadline (the 30-day time period within which an employee must notify the employer of an injury), we have held that ignorance of the law does not amount to good cause so as to afford an employee relief from the effects of failing to observe such time period. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993.

The evidence in this case presents a slightly different situation. Reasonable minds certainly could differ on the interpretation of the intent of the July 23rd letter, even assuming, as claimant argues, that no "magic words" are required to effectively dispute a doctor's opinion. Coupled with that letter, however, is the testimony of claimant's attorney, which states in part as follows:

> Mr. D:. . . we did submit the letter to Texas Workers' Compensation (sic) on July the 23rd, 1992, for the purpose of getting a second--Dr. O designated as a second choice of doctors, and for the purpose of informing all parties involved that we were disputing any and all impairment ratings that may have been given prior to that time. . . . It wasn't really until quite a bit later, and I don't have those exact dates, but it was quite a bit later that we actually received all of the impairment ratings, and we got copies of the medical reports and copies of the file from the Carriers (sic) and the TWCC. To the best of my knowledge, I can only testify that when these things were called to my attention, and it was substantially after July 27th, 1992, that I received copies of the file, and all the medical reports and all the impairment ratings that had been given [claimant]. . . .

We do not doubt that Mr. D, who began to represent claimant somewhat late in his claim, was taking all steps he needed to take to obtain all pertinent information regarding claimant's case. However, his testimony that he had not, and apparently through no omission on his part, received the information about Dr. A's impairment rating at the time the July 23rd letter was written casts real doubt about the letter's actual intent. Based upon the cumulative evidence in this case, including the ambiguous language of the July 23rd letter and the subsequent, clear language of dispute contained in the November BRC request (and arguably in other documents subsequent to July 23rd), we find that the hearing officer's determination that the July 23rd letter constituted a timely dispute is against the great weight and preponderance of the evidence. We therefore reverse the decision of the hearing officer and render a new decision that the claimant did not timely dispute Dr. A's certification of MMI and his impairment rating.

Because of our determination of carrier's first point of appeal, the remaining appeals points are moot and we need not address them.

The decision and order of the hearing officer are reversed and a new decision rendered that the claimant did not timely dispute Dr. A's certification of MMI and impairment rating, and that accordingly both have become final.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Panel Judge